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No. 93-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

IN RE: APPLICATION OF
SILVIA GIANOLI ALDUNATE, AND
JOSÉ MIGUEL BARRIGA GIANOLI.

MARIA LUISA DE CASTRO FODEN,
AND EDWARD FODEN,

Petitioners,

—v.—

SILVIA GIANOLI ALDUNATE, AND
JOSÉ MIGUEL BARRIGA GIANOLI,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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September 30, 1993

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QUESTION PRESENTED

Did the United States Court of Appeals for the Second Circuit err in holding — in conflict with the First, Third, Eleventh and D.C. Circuits — that foreign litigants may obtain discovery pursuant to 28 U.S.C. § 1782 for use in a foreign proceeding even though the discovery sought would not be available to them under the laws of their own jurisdiction?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

IN RE: APPLICATION OF
SILVIA GIANOLI ALDUNATE, AND
JOSÉ MIGUEL BARRIGA GIANOLI.

MARIA LUISA DE CASTRO FODEN,
AND EDWARD FODEN,

Petitioners,

-v-

SILVIA GIANOLI ALDUNATE, AND
JOSÉ MIGUEL BARRIGA GIANOLI,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Maria Luisa De Castro Foden and Edward Foden respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this action on August 20, 1993.

OPINIONS BELOW

The opinion of the Second Circuit, which is not yet reported, is reprinted in the appendix hereto, at pages A1 through A19. The decision of the United States District Court for the District of Connecticut was read into the record after oral argument on March 8, 1993 and is not reported. It is reprinted in the appendix hereto at pages A20 through A24.

JURISDICTION

The judgment of the Court of Appeals was entered on August 20, 1993. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 28 U.S.C. § 1782.

STATUTE INVOLVED

28 U.S.C. § 1782(a) provides in full:

> "The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the

international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege."

STATEMENT OF THE CASE

This petition presents a question of importance to the foreign relations of the United States, to the federal court system and to individuals and businesses in the United States who may be parties or witnesses in foreign litigation. The question is whether 28 U.S.C. § 1782 requires that our system of expansive compulsory discovery be made available to litigants in a foreign proceeding when the procedures and practices of the judicial system governing the foreign proceeding provide them no such rights and powers.

The Second Circuit's decision below creates a clear conflict among the circuits on this issue. Until the present decision, each Court of Appeals that had addressed the issue — the First, Third, Eleventh and District of Columbia Circuits — had imposed or recognized a requirement that to obtain discovery in the United States under 28 U.S.C. § 1782, applicants must show that the discovery they seek would have been available to them in the foreign proceeding

if the documents or witness in question were found within that jurisdiction. [1]

The Second Circuit's express rejection of this authority and of the discoverability requirement is based on an incorrect construction of the statute and is contrary both to its legislative history and to the established principle that § 1782 was intended to give foreign litigants the opportunity to obtain from U.S. witnesses whatever kinds of information they could obtain within their own country — *but not more*.

Permitting one side in a foreign litigation to obtain discovery because of the happenstance that the witnesses or documents it seeks are located in the United States will upset the balance between litigating parties that each nation creates within its own judicial system and impose U.S. procedures capriciously on some but not all parties to the foreign proceeding. This intrusion into a foreign adjudicatory system will inevitably be offensive to foreign sovereigns, and will therefore undermine the statute's ultimate purpose of encouraging foreign countries to cooperate in providing discovery for use in litigation in the United States. It will also unfairly disadvantage U.S. litigants in foreign proceedings by requiring that they alone among the parties litigant provide discovery in a system that recognizes no such obligation.

The conflict among the circuits on the issue is not merely a theoretical inconsistency in federal jurisprudence. It is a

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[1] *In Re Application of Asta Medica, S.A.*, 981 F.2d 1, 7 (1st Cir. 1992); *In Re Request from Crown Prosecution Service of United Kingdom*, 870 F.2d 686, 692 n.7 (D.C. Cir. 1989); *Lo Ka Chun* v. *Lo To*, 858 F.2d 1564, 1566 (11th Cir. 1988); *In Re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988), *cert. denied sub nom. Azar* v. *Ministry of Affairs of Trinidad and Tobago*, 488 U.S. 1005 (1989); *John Deere, Ltd.* v. *Sperry Corp.*, 754 F.2d 132, 136 (3d Cir. 1985).

practical impediment to consistent and orderly response to international litigants seeking to use our courts to obtain the tactical advantage of American-style discovery for one side or the other in proceedings that were intended to give neither side such an opportunity. Unless the fortuity of residence in the Second Circuit of a witness or party to a foreign litigation is to affect substantively the rights of both U.S. citizens and foreign litigants, this conflict should be resolved. As in *Banco Nacional de Cuba* v. *Sabbatino*, this Court should grant certiorari "because the issues involved bear importantly on the conduct of the country's foreign relations and more particularly on the proper role of the Judicial Branch in this sensitive area." 376 U.S. 398, 407 (1964).

FACTUAL BACKGROUND

As set out in the Second Circuit's decision at A3-A6, the proceedings below arose out of an application by respondents Silvia Gianoli Aldunate and José Miguel Barriga Gianoli to the United States District Court for the District of Connecticut for an order pursuant to § 1782 granting them discovery from petitioners Maria Luisa Foden and Edward Foden.

In May 1992, respondents had been appointed provisional guardians of the property of Ciro Gianoli in a Chilean incompetency proceeding. Ciro Gianoli (now age eighty-six), is a citizen of both Uruguay and Chile. Respondent Silvia Gianoli Aldunate is one of Mr. Gianoli's daughters; respondent José Miguel Barriga Gianoli is Mr. Gianoli's grandson. Mr. Gianoli and his first wife, Elena Aldunate, have been separated for decades, but because of strictures of Chilean law have never divorced. Mr. Gianoli has had various disputes with the children and grandchildren of his first marriage and has been estranged from them for years.

On September 18, 1980, Mr. Gianoli and Ana Eguiguren (now age seventy), whom Mr. Gianoli has known since

approximately 1949, participated in a marriage ceremony in Montevideo, Uruguay. Mrs. Eguiguren and Mr. Gianoli had established a relationship as a couple approximately four years before the ceremony and have lived together as husband and wife ever since. Mrs. Eguiguren is one of the two court-appointed provisional guardians of Mr. Gianoli's person.

Petitioner Maria Luisa Foden is Mrs. Eguiguren's daughter. She and her husband, petitioner Edward Foden, reside in Hartford, Connecticut and are U.S. citizens.

THE PROCEEDINGS BELOW

On October 27, 1992, respondents applied to the district court *ex parte* to obtain discovery from petitioners pursuant to § 1782, allegedly for use in compiling an inventory of Mr. Gianoli's assets in the incompetency proceeding in Chile.

On November 16, 1992, the district court granted the application and issued subpoenas to petitioners. On January 8, 1993, petitioners moved to vacate the court's order and to quash the subpoenas on the ground, among others, that respondents had failed to make the threshold showing required by § 1782 that the discovery sought would be available to them under Chilean law.

On March 8, 1993, the district court denied petitioners' motion, rejecting the principle that under § 1782 information sought must be discoverable in the foreign jurisdiction. (A22-A23.)

On appeal, the Second Circuit affirmed the district court, holding that "section 1782 does not contain a requirement that the material requested in the district court be discoverable under the laws of the foreign jurisdiction." (A18-A19.) The court stated that this result was consistent with what it characterized as "unambiguous" statutory language. (A11.)

The Second Circuit expressly recognized that it was creating a conflict among the circuits, stating, for example, "[t]he Fodens cite First and Eleventh Circuit decisions that explicitly read a discoverability requirement into § 1782 and argue that the reasoning in those decisions is persuasive [citing *Asta Medica*; *Lo Ka Chun*; *Trinidad and Tobago*, *supra*]. *We disagree.*" (A13 (footnote omitted; emphasis added).)

The Second Circuit also noted that "the district court did not make a finding as to the parties' ability to obtain pre-trial discovery under Chilean law . . . ." (A17.)[2]

REASONS FOR GRANTING THE WRIT

I.

The Second Circuit's Rejection of the Discoverability Requirement Creates a Clear Conflict Among the Courts of Appeals.

The Courts of Appeals for the First, Third, Eleventh and District of Columbia Circuits have all imposed or recognized the requirement that to be discoverable under § 1782 information must be discoverable in the applicable foreign jurisdiction. The Second Circuit is the first appellate court to diverge from this consistent series of holdings.

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[2] If a discoverability requirement is now recognized, the case should be remanded to the district court with instructions to determine whether Chilean law permits the proposed discovery. The parties have stipulated to a stay of discovery until the sooner of this Court's issuance of a decision on this petition or November 30, 1993. If the Court issues a writ of certiorari, the stay will continue.

Most recently, the First Circuit held that

> "a litigant requesting assistance under Section 1782 has to show that the information sought in the United States would be discoverable under foreign law."

In Re Application of Asta Medica, S.A., 981 F.2d 1, 7 (1st Cir. 1992). The court emphasized that the lack of such a requirement not only would enable a litigant in purely foreign litigation to gain an unfair advantage over its adversary, "but more importantly, foreign countries may be offended by the use of United States procedure to circumvent their own procedures and laws." *Id.* at 6.

The Eleventh Circuit also has expressly imposed this prerequisite in two separate cases in which foreign litigants sought discovery under § 1782 for use in a foreign proceeding. *See In Re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988), *cert. denied sub nom. Azar* v. *Minister of Legal Affairs of Trinidad and Tobago*, 488 U.S. 1005 (1989) (". . . the district court must decide whether the evidence would be discoverable in the foreign country before granting assistance"); *Lo Ka Chun* v. *Lo To*, 858 F.2d 1564, 1566 (11th Cir. 1988) (case remanded "for a determination as to the discoverability of the evidence sought by appellee Lo To" in foreign country).

Similarly, the Third Circuit, in *John Deere Ltd.* v. *Sperry Corp.*, 754 F.2d 132 (3d Cir. 1985), held that "[a] grant of discovery that trenched upon the clearly established procedures of a foreign tribunal would not be within section 1782." *Id.* at 135. The court went on to state:

> "Our decision does not countenance the use of U.S. discovery procedures to evade the limitations placed on domestic pre-trial disclosure by foreign tribunals. Concern that foreign discovery provisions not be circumvented by procedures authorized in American

courts is particularly pronounced where a request for assistance issues not from letters rogatory, but from an individual litigant."

Id. at 136.[3]

While the Second Circuit stated that *John Deere* "was not a case about whether section 1782 requires discoverability" (A14), the Third Circuit plainly recognized the importance of the discoverability requirement, particularly when (as here) the § 1782 applicant is not a foreign tribunal or governmental authority, but merely a private litigant. In fact, the Third Circuit found that use of § 1782 was proper in the case before it *expressly* because of its finding that "the testimony sought would generally be subject to discovery were all the parties in Canada." 754 F.2d at 136. Any perceived ambiguity in the Third Circuit decision simply exacerbates the division among the circuits and underscores the need for resolution of the issue by this Court.

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[3] The District of Columbia Circuit has also recognized the discoverability requirement. *See In Re Request from Crown Prosecution Service of the United Kingdom*, 870 F.2d 686, 687, 692, n. 7 (D.C. Cir. 1989) (quoting *Trinidad and Tobago, supra*, and *John Deere, supra*).

II.

Discovery Should Be Permitted Under § 1782 Only If It Would Be Permitted In the Underlying Foreign Litigation.

A. Section 1782 Should Be Construed to Include a Discoverability Requirement In Order to Prevent the Law from Being Used for Purposes Congress Never Intended.

Although the Second Circuit describes the language of § 1782 as "unambiguous," every other circuit construing it has recognized the discoverability requirement that the Second Circuit could not discern.

The Second Circuit held that because the text of § 1782 does not explicitly set out a discoverability requirement, no such requirement can exist. As shown below, however, the relevant language of § 1782 is by no means clear and, to permit practical application, must be interpreted in light of its history and purposes and in accord with public policy. *See Train* v. *Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976) ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" (citations omitted)).

Read literally, the requirement of § 1782 that the testimony or documents sought be "for *use in* a proceeding in a foreign or international tribunal" (emphasis added) appears directed not to discovery, but to the production of admissible evidence that will actually be *used* (*i.e.*, put in evidence) in the foreign proceeding. The word "discovery" — with its connotation of pretrial information-gathering — does not even appear in the statute. If Congress had wished, it could easily have used the word "discovery," or could have provided

more broadly for production of information "in connection with" or "in aid of" (rather than simply "for use in") the foreign proceeding. Such language would have established more clearly that Congress intended to permit American-style discovery. Indeed, it is not the language of the statute but judicial interpretation of the legislative history and Congressional intent that has led courts to construe Section 1782 broadly to permit discovery rather than only the collection of admissible evidence. *See, e.g., John Deere, supra*, 754 F.2d at 136-37; *Trinidad and Tobago, supra*, 848 F.2d at 1156.

Petitioners do not take issue with this liberal interpretation of Section 1782 as a discovery statute. They submit, however, that because this interpretation necessarily drew upon the history and purposes of the statute, it makes no sense now to rely upon the supposedly "plain meaning" of the statute to require that this implied right to take discovery must be unlimited because there is no express limitation in the words of the statute.

As is shown in Section B below, the Courts of Appeals that have adopted or recognized the discoverability requirement have concluded, after reviewing the legislative history and the purposes of the statute, and rejecting admissibility under foreign law as the appropriate standard, that the best protection against misuse of the law, and the best assurance that the goals of the statute will be fulfilled, is to look to what the foreign court in question would view as legitimate. To adopt any other measure — including U.S. views on the proper scope of discovery — would usurp both the power of foreign courts to organize and control controversies before them and the right of foreign sovereigns to determine for themselves the role pretrial discovery should play in their own systems of justice. *See, e.g., John Deere*, 754 F.2d at 136-37 (rejecting admissibility and stating, "Where, in the first instance, the matter sought would be discoverable were all persons within the foreign jurisdiction, the foreign tribunal

should decide what use it wishes to allow the elicited documents and testimony."); *Asta Medica,* 981 F.2d at 7 (reviewing the statute and legislative history and concluding "Congress . . . intended that the primary burden fall upon the applicant, who has to make a showing that the information is discoverable under foreign law.").[4]

B. The Second Circuit's Decision Defeats the Fundamental Purposes of the Statute and Threatens to Disrupt Trans-Border Litigation And Unduly Burden the Federal Courts.

1. The discoverability requirement is a necessary corollary to the central purpose of § 1782 of encouraging foreign countries to cooperate in providing discovery.

The Court of Appeals for the First Circuit concluded that without a discoverability requirement "foreign litigants may use Section 1782 to circumvent foreign law and procedures" and to obtain greater discovery than foreign law permits. *Asta Medica*, 981 F.2d at 6.

To permit or to facilitate this result would be contrary to a basic purpose of § 1782: the hope "that the initiative taken by the United States in improving its procedures will invite foreign countries similarly to adjust their procedures." S.

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[4] The discoverability requirement is not the only issue under § 1782 that has required interpretive analysis. For example, the Second Circuit has itself interpreted the unadorned phrase, "for use in a proceeding . . ." — reading into it a requirement that the foreign proceeding must either be pending or "imminent — very likely to occur and very soon to occur," in order to warrant assistance under the statute. *In Re Request for International Judicial Assistance (Letter Rogatory) for the Federative Republic of Brazil*, 936 F.2d 702, 706 (2d Cir. 1991).

Rep. No. 1580, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782 (the "Senate Report") at 3783.

As the First Circuit concluded in *Asta Medica*, to interpret § 1782 to permit discovery in the United States that was not available in the foreign nation

> "would lead some nations to conclude that United States courts view their laws and procedures with contempt. In this manner, the broader goal of the statute — stimulating cooperation in international and foreign litigation — would be defeated since foreign jurisdictions would be reluctant to enact policies similar to Section 1782."

982 F.2d at 7. *See also John Deere*, *supra*, 754 F.2d at 135-36.[5]

The Second Circuit agreed that encouraging foreign cooperation in discovery was a fundamental purpose of § 1782 (A8, A13-A14), but "disagree[d] with the First Circuit's holding that, as a result of these concerns, Congress intended section 1782 to have an implied discoverability requirement." The court stated, "[i]nstead, we believe Congress intended that these concerns be addressed by a

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[5] In rejecting the discoverability requirement, the Second Circuit notes that the text of the statute is silent on the specific subject of discoverability and that § 1782 was amended in 1964 to "liberalize" the procedures for obtaining information. (A8, A12.) The 1964 amendments, however, broadened only the *procedures* for obtaining information — for example, by allowing private litigants to obtain discovery. The amendments did not change the *substance* of what can be obtained. In fact, by allowing private litigants (not just foreign tribunals and governmental litigants) to seek assistance directly, the 1964 amendments increased the importance of the requirement that discovery unavailable under foreign law not be permitted. *See, e.g., John Deere*, 754 F.2d at 136 (quoted *supra* at pp. 8-9).

district judge's exercise of discretion." (A14 (citation omitted).)

This retreat to the discretion of individual judges is simply unworkable and poses great risks for no good purpose. If discoverability is not the rule, there is no standard that can reasonably be substituted. To exercise discretion as the Second Circuit's holding requires, district courts will first have to determine whether the information sought goes beyond what the foreign court would permit in its own system and then address the impossibly amorphous issue of whether what is proposed goes enough beyond the foreign country's procedure to give offense. Deciding how much beyond is too much beyond will be an unguided, ad hoc and dangerous exercise. It also will not eliminate the need for examination of foreign law. Rather, it will complicate the problem by requiring expert testimony not just about discovery, but about theories of sovereignty and judicial philosophy.

No other circuit has found that the threshold issue of discoverability can safely be left to the discretion of the district courts. *See Asta Medica*, 981 F.2d at 7 (the district court's considerable "discretion . . . is limited by the restriction that we find . . . to be implicitly required by section 1782 [the discoverability requirement], based upon its history, rationale, and the policy considerations we have discussed"); *Trinidad and Tobago*, 848 F.2d at 1156 ("the district court *must* decide whether the evidence would be discoverable in the foreign country before granting assistance" (emphasis added)).[6]

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[6] The Second Circuit noted with approval that the district court had found that the discovery sought would "aid" the Chilean court and therefore "'would not be an affront to the Chilean court or the Chilean sovereignty.'" (A18.) The finding that the information sought would (in the view of a U.S. court) be (continued...)

2. Congress did not intend effectively to amend foreign law to the disadvantage of U.S. parties to foreign litigation.

To permit a foreign litigant to obtain broad, U.S.-style discovery without determining whether such discovery would be available in the foreign jurisdiction will also destroy the equitable balance between litigants that each nation creates for its own judicial system. As the First Circuit recognized in *Asta Medica*:

> "Under the district court's ruling, a United States party involved in litigation in a foreign country with limited pre-trial discovery will be placed at a substantial disadvantage vis-a-vis the foreign party. All the foreign party need do is file a request for assistance under Section 1782 and the floodgates are open for unlimited discovery while the United States party is confined to restricted discovery in the foreign jurisdiction. Congress did not amend Section 1782 to place United States litigants in a more detrimental position than their opponents when litigating abroad. *This result would be contrary to the concept of fair play embodied in United States discovery rules* and the notion that '[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.' *Societe Nationale*

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[6](...continued)

helpful to the foreign court, however, does not answer the question of whether "foreign countries may be offended by the use of United States procedure to circumvent their own procedures and laws." *Asta Medica*, 981 F.2d at 6. Indeed, it seems highly presumptuous for our courts to claim the prescience needed to decide that a Chilean court could not be offended by a U.S. court endowing respondents with powers broader than are given to them by virtue of their appointment in Chile.

Industrielle Aerospatiale v. *U.S. Dist. Court for Southern Dist.*, 482 U.S. 522, 540 n.25. . . ."

981 F.2d at 5-6 (emphasis added).

The legislative history of § 1782 establishes that Congress did not intend to export U.S.-style discovery to other nations. *See* Senate Report at 3788. As the Senate Report also stated (at 3783):

> "Enactment of [Section 1782] will constitute a major step in bringing the United States to the forefront of nations *adjusting their procedures to those of sister nations* and thereby providing *equitable* and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects."

(Emphasis added.) The Second Circuit's rejection of the discoverability requirement will lead to the opposite of the intended result: it will unilaterally adjust some, but not all, foreign procedures to ours, thereby imposing procedures on international litigants *inequitably*.[7]

3. The elimination of the discoverability requirement places an undue burden on the district courts.

Eliminating the discoverability requirement amounts to an open invitation to foreign litigants to seek information here to which they are not entitled in their home jurisdiction.

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[7] In recently imposing the discoverability requirement, a California district court recognized the inequity of such a result: "This court does not believe that Congress intended to pass legislation that would significantly weaken the position of United States citizens in foreign legal proceedings." *In Re Application for an Order for Judicial Assistance in a Foreign Proceeding in the High Court of Justice, Chancery Division, England*, 147 F.R.D. 223, 226 (C.D. Cal. 1993).

Given the expanding nature of international commercial litigation — particularly in the Second Circuit — the potential expense and burden of such a rule for U.S. courts and U.S. parties will be substantial, and will produce no commensurate benefit for our citizens or judicial system.

The discoverability requirement, by contrast, places little or no burden on the district court. As the First Circuit stated in *Asta Medica*:

> "Congress . . . intended that the *primary burden fall upon the applicant, who has to make a showing that the information is discoverable under foreign law*. . . . The only burden that would fall upon the district court is to make a discovery determination based upon the submission by the parties. That is hardly an 'onerous' burden."

981 F.2d at 7 (footnotes omitted).

CONCLUSION

Because a large number of international businesses and foreign individuals are located within the Second Circuit, the decision of the Court of Appeals for the Second Circuit will have a more significant (and damaging) impact upon international litigation than is normally the case when a single circuit renders a decision that is inconsistent with the rule of law adopted by other circuits. Unless corrected by this Court, the Second Circuit's decision threatens substantially to undermine the fundamental goals of § 1782 and to encourage a flood of § 1782 applications into already overburdened federal courts without any countervailing benefit to the interests of justice.

Respectfully submitted,

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September 30, 1993

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1543 — August Term, 1992
(Argued: May 6, 1993 Decided: August 20, 1993),
Docket No. 93-7215

IN RE: APPLICATION OF SILVIA GIANOLI ALDUNATE, AND JOSE MIGUEL BARRIGA GIANOLI.

MARIA LUISA DE CASTRO FODEN, and EDWARD FODEN,

Appellants,

— against —

SILVIA GIANOLI ALDUNATE, and JOSE MIGUEL BARRIGA GIANOLI,

Appellees.

Before:

MESKILL, PIERCE and WALKER,
Circuit Judges.

Appeal from an order of the United States District Court for the District of Connecticut, Cabranes, *C.J.*, denying appellants' motion to vacate the district court's order granting discovery against appellants pursuant to 28 U.S.C. § 1782 and to quash discovery subpoenas issued pursuant to that order.

We affirm.

PHILIP L. GRAHAM, JR., New York City (Henry Christensen III, Basil P. Zirinis III, Anthony C. Walsh, Sullivan & Cromwell, New York City, Steven R. Humphrey, Robinson & Cole, Hartford, CT, of counsel), *for Appellants*.

KENNETH A. CARUSO, New York City (Andrew W. Regan, Shearman & Sterling, New York City, James F. Stapleton, Joy Beane, Day, Berry & Howard, Stamford, CT, of counsel), *for Appellees*.

MESKILL, *Circuit Judge*:

This is an expedited appeal from a final order of the United States District Court for the District of Connecticut, Cabranes, *C.J.*, denying the motion of appellants Maria Luisa de Castro Foden and Edward Foden (the Fodens) to vacate the district court's order granting discovery against them pursuant to 28 U.S.C. § 1782 and to quash discovery subpoenas issued pursuant to that order. Appellees Silvia Gianoli Aldunate and Jose Miguel Barriga Gianoli (the Appellees), provisional guardians of the property of Ciro Gianoli Martinez (Ciro) in a Chilean incompetency proceeding, applied *ex parte* to the district court for an order

pursuant to 28 U.S.C. § 1782 granting them discovery from the Fodens concerning Ciro's assets in the United States. Section 1782 provides, in pertinent part, that upon the application of an interested party, the district court of the district in which a person resides or is found may order him to give his testimony or to produce documents for use in a proceeding in a foreign or international tribunal.

The district court granted the Appellees' motion and issued subpoenas against the Fodens. The Fodens moved to vacate the district court's order and quash the subpoenas on the grounds that, *inter alia*, section 1782 requires a threshold showing that the discovery sought in the district court would be available under the laws of the foreign jurisdiction, and that the Appellees had failed to make such a showing. The district court denied the motion, and this appeal followed. For the reasons stated below, we affirm.

BACKGROUND

Ciro Gianoli Martinez, an 86 year old businessman and successful investor, resides in Santiago, Chile. Ciro married Elena Aldunate Lynch in 1935 and had four children, two of whom are still alive. Appellee Silvia Gianoli Aldunate is one of the living daughters and appellee Jose Miguel Barriga Gianoli is the son of one of the deceased daughters. Ciro and his first wife have been separated for decades, but allegedly under Chilean law are unable to obtain a divorce. Thirteen years ago, Ciro participated in a marriage ceremony in Uruguay with Ana Eguiguren Rozas (Ana), age 69, whom he had known for approximately 31 years. Ciro and Ana have lived together since the ceremony. Appellant Maria Luisa de Castro Foden is Ana's daughter and lives with her husband, appellant Edward Foden, in Connecticut.

Ciro's mental health recently deteriorated, prompting all of Ciro's living descendants to commence an incompetency proceeding before the Third Civil Court of Santiago, Chile,

on April 9, 1992. The Fodens and the Appellees give differing accounts of Ciro's relationship with his daughters and Ana and of when his mental health deteriorated. The Fodens claim that Ciro has been estranged from his daughters and grandchildren for years, and that it was Ciro's intention that Ana was to care for him if he became ill. They state that Ciro was in good mental and physical health up until the time of a February 1992 seizure. The Appellees state that Ciro's mental health was good and his contact with his daughters and grandchildren was "consistent and regular" up until about 1989. At that point, according to the affidavits of two medical assistants who attended to Ciro at home, Ana began to isolate Ciro from his family and friends. Ana is accused, for example, of denying Ciro use of the telephone or access to any visitors.

On May 22, 1992, the Third Civil Court provisionally declared Ciro incompetent. The court appointed the Appellees as Ciro's provisional general guardians. Raul Jose Alamos Latelier, Ciro's attorney and business colleague, was also appointed provisional guardian, but "for the sole purpose of assuming direct care of [Ciro], which task he shall carry out jointly with Ana Eguiguren Rozas." The court ordered the provisional guardians that "[i]n due time, a certified inventory of the property of [Ciro] must be conducted." Ana appealed the orders of the civil court, and the Supreme Court of Chile affirmed.

On June 4, 1992, the provisional guardians filed an inventory of Ciro's assets located in Chile with the Third Civil Court. In the inventory, the Appellees stated that Ciro also "possesses considerable property abroad," that they "are not, at present, in a position to give specific details on his assets," but that they are "making investigations and taking other measures to specify the amount and location of the assets located abroad" and will file an expanded inventory.

On October 27, 1992, the Appellees applied *ex parte* to the United States District Court for the District of Connecticut for a discovery order pursuant to 28 U.S.C. § 1782. In support of their application the Appellees submitted the affidavit of George E. Deren, a financial investigator hired by the Appellees' counsel. In the affidavit, Deren describes the background of the incompetency proceeding, and then describes Casabianca Investments S.A. (Casabianca), a holding company founded by Ciro in 1981 through which "considerable" assets were held outside of Chile. Deren states that his investigations revealed that the Fodens became involved with Casabianca in September 1989, when the bank statements of a Casabianca account at Swiss Bank New York began to be mailed in care of Maria Luisa Foden to the address of her Hartford, Connecticut law office. According to the affidavit, beginning in November 1989, millions of dollars passed through the account, and the account was finally closed in September 1990. That same month, Maria Luisa Foden directed that the remaining funds in Casabianca's Daily Dollar Account be wired to a client account of hers in Hartford. Deren states that on July 10, 1990, Edward Foden had become Vice President, Secretary and a member of the board of directors of Casabianca and Maria Luisa Foden had been granted a general power of attorney by Casabianca's president. Finally, Deren states that on March 11, 1991, a meeting of the shareholders of Casabianca was held in Hartford with only the Fodens in attendance. According to the minutes, "[a]ll shares of the company issued and in circulation were present," and the shareholders resolved that Casabianca be dissolved. The Appellees asked the district court to order the Fodens to "provide any documents they have and [to] give testimony concerning the assets of Casabianca, and the current whereabouts of those assets," concluding that "[i]nformation about these assets is relevant to, and will be used in, the guardianship proceeding in the Chilean court, in which the

Guardians must file an inventory of Mr. Gianoli's assets wherever they may be found."

On November 16, 1992, Chief Judge Cabranes granted the Appellees' application and issued subpoenas requiring the Fodens to produce documents and to appear for depositions. On January 8, 1993, the Fodens moved to vacate the order of judicial assistance and to quash the subpoenas. After briefing and oral argument, Chief Judge Cabranes orally denied the motions, holding that (1) all of the requirements of section 1782 had been satisfied, (2) section 1782 does not require that the evidence sought in the district court be discoverable under the laws of Chile, and (3) in any event, Chilean law empowers the Appellees to obtain the information requested. The Appellees and the Fodens stipulated to a stay of discovery pending this expedited appeal.

DISCUSSION

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. *See In re Letters Rogatory Issued by the Director of Inspection of India*, 385 F.2d 1017, 1018 (2d Cir. 1967) (denial of motion to vacate discovery order and to quash subpoena issued pursuant to 28 U.S.C. § 1782 constitutes final, appealable decision). We affirm, holding that section 1782 does not require the district court to make a finding of discoverability under the laws of the foreign jurisdiction. In addition, we hold that the district court's exercise of discretion was properly guided by the purposes of the statute.

I. History and Purposes of 28 U.S.C. § 1782

An understanding of the history and purposes of 28 U.S.C. § 1782 is an important first step in our inquiry. Section 1782, entitled "Assistance to foreign and international

tribunals and to litigants before such tribunals," provides in pertinent part:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person . . . . The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing.

28 U.S.C. § 1782(a).

Federal law has provided for some form of judicial assistance to foreign courts since 1855. *See* Act of March 2, 1855, ch. 140, § 2, 10 Stat. 630 (allowing United States courts to compel testimony in response to letters rogatory from any court of a foreign country). However, early statutes granting judicial assistance were quite narrow in scope; for example, the statutes in effect from 1863 to 1948 required the foreign government receiving assistance to be a party or have an interest in the suit, and the suit had to be for the recovery of money or property. *See In re Letter Rogatory from the Justice Court, Montreal, Canada*, 523 F.2d 562, 564-65 (6th Cir. 1975) (reviewing the history of predecessor statutes to section 1782). The evolutionary process from the 1855 act to the current statute, most recently amended in 1964, has generally been one of increasingly broad applicability. For example, the judicial assistance statute progressively has applied to suits for "the recovery of money or property," to "any civil action," to "any judicial proceeding," and finally, to "a proceeding in a foreign or international tribunal." *See id.* at 565 ("These changes have made the statute increasingly

less restrictive and thus have evidenced the intent of Congress that the assistance be available to foreign governments in a greater number of instances.")

The 1964 amendments to section 1782 were drafted by the United States Commission on International Rules of Judicial Procedure, which was created by Congress in 1958. Pub. L. No. 85-906, 72 Stat. 1743, 1958 U.S. Code Cong. & Admin. News 2097. The amendments primarily (1) expanded the class of litigation in which section 1782 could be used by substituting the word "tribunal" for the word "court" and by adding international tribunals, (2) allowed not only foreign tribunals and officials to initiate the process, but also private litigants ("any interested person"), and (3) deleted the requirement that the foreign litigation actually be pending. Pub. L. No. 88-619, 78 Stat. 995, 997 (1964). The primary intent of the amendments was to "clarif[y] and liberalize[] existing U.S. procedures for assisting foreign and international tribunals and litigants in obtaining oral and documentary evidence in the United States." S. Rep. No. 1580, 38th Cong., 2nd Sess. (1964), *reprinted in* 1964 U.S. Code Cong. & Admin. News 3782, 3788 (hereinafter "Senate Report"). The desired effect was that "the initiative taken by the United States in improving its procedures will invite foreign countries similarly to adjust their procedures." Senate Report at 3783. We have recently characterized the purpose of these changes as the "twin aims of providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts." *In re Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir.) (*Malev*), *cert. denied sub nom. United Technologies Int'l* v. *Malev Hungarian Airlines*, 113 S. Ct. 179 (1992).

II. "Discoverability" Requirement

The Fodens' primary argument on appeal is that section 1782 contains an implicit requirement that the material requested in the district court be discoverable under the laws of the foreign jurisdiction. The Fodens state that "[d]iscovery under § 1782 is intended to give foreign litigants the opportunity to obtain from U.S. witnesses whatever kinds of information they could obtain within their own country, *but not more*." Recognizing that there is no Second Circuit case law directly on point, the Fodens assert that four of our sister circuits have recognized a discoverability requirement in section 1782, and that the reasoning in those cases is persuasive. *See In re Application of Asta Medica, S.A.*, 981 F.2d 1, 7 (1st Cir. 1992); *In re Request from Crown Prosecution Service of United Kingdom*, 870 F.2d 686, 692-93 & n.7 (D.C. Cir. 1989) *Lo Ka Chun* v. *Lo To*, 858 F.2d 1564, 1566 (11th Cir. 1988); *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988), *cert. denied sub nom. Azar v. Minister of Legal Affairs of Trinidad and Tobago,* 488 U.S. 1005 (1989); *John Deere Ltd.* v. *Sperry Corp.*, 754 F.2d 132, 136 (3d Cir. 1985). The Fodens argue that without a discoverability requirement, liberal United States discovery procedures would be unfairly imposed on those parties to foreign proceedings present in the United States or with United States ties, "upset[ting] the balance between litigants that each nation creates within its own judicial system" and effectively amending foreign law regarding the compulsory production of evidence as it applies to litigants with connections to the United States.

Chief Judge Cabranes rejected the Fodens' argument that section 1782 requires discoverability, finding "nothing in the text of section 1782 [requiring] that the law of the foreign tribunal provide for discovery of the information sought in the United States" and holding that the requirements of

section 1782 had been fully met by the Appellees. We ordinarily review for abuse of discretion a district court's *grant of discovery under section 1782. See Malev*, 964 F.2d at 99. However, the question of whether section 1782 imposes limitations on the district court's exercise of discretion is a question of law, which we review *de novo*. *See United States* v. *Edwards*, 960 F.2d 278, 281 (2d Cir. 1992) ("The interpretation of a federal statute is a question of law which we review *de novo*."); *see also Asta Medica*, 981 F.2d at 4 (reviewing *de novo* the question of whether a district court's discretion under section 1782 is limited by the requirement of discoverability). We agree with the district court that section 1782 does not impose the requirement that the material sought in the United States be discoverable under the laws of the foreign jurisdiction.

We start, as we must, with the language of the statute. *See United States* v. *Ron Pair Enterprises*, 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.'") (quoting *Griffin* v. *Oceanic Contractors*, 458 U.S. 564, 571 (1982)). The statutory language is unambiguous in its requirements: (1) the person from whom discovery is sought must reside or be found in the district of the district court to which the application is made, (2) the discovery must be "for use in a proceeding in a foreign or international tribunal," and (3) the application must be made "by a foreign or international tribunal" or by "any interested person." The language makes no reference whatsoever to a requirement of discoverability under the laws of the foreign jurisdiction. Indeed, the only language in section 1782 arguably relevant to the issue of whether the district court must adopt the discovery requirements of the foreign jurisdiction is permissive language, stating that the practice and procedure prescribed by the district court "*may* be in whole or part the practice

and procedure of the foreign country or the international tribunal." 28 U.S.C. § 1782(a) (emphasis added). As we recently made clear in *Malev*, we are not free to read extra-statutory barriers to discovery into section 1782. 964 F.2d at 100.

In *Malev*, appellant Malev had filed an application for discovery pursuant to section 1782 for use in a proceeding before a Hungarian court. The district court denied the discovery request and on appeal we reversed and remanded, holding that the district court had abused its discretion by relying on improper factors in its denial of discovery. The district court had based its decision primarily on the ground that Malev's section 1782 application was "'premature and unnecessary'" because Malev had "'never made a formal discovery request upon [the appellees] before the Hungarian Court.'" *Malev*, 964 F.2d at 100. The district court's other grounds for denial were that the Hungarian court had failed to make a request for assistance to the district court and that if the district court granted the requested discovery, it would be forced to bear the onerous burden of supervising reciprocal discovery. In holding each of the district court's grounds improper, we turned to the unambiguous language of section 1782. *Id.* at 100-01. We found "nothing in the text of 28 U.S.C. § 1782 which would support a quasi-exhaustion requirement of the sort imposed by the district court," and held that district courts may not impose such "extra-statutory barriers to obtaining discovery." *Id.* at 100. We further held that the district court's requirement that the foreign court make a request for assistance would impermissibly read the language "upon the application of any interested person" out of section 1782 and that section 1782 does not contain any requirement that the district court supervise reciprocal discovery. *Id.* at 101.

As we also pointed out in *Malev*, a literal reading of the unambiguous language of section 1782 comports with the purposes and legislative history of the statute. *Id.* at 100-01.

The Senate Report makes clear that the 1964 amendments were intended to leave the district courts with wide discretion in granting relief under section 1782:

> [Section 1782(a)] leaves the issuance of an appropriate order to the discretion of the court which, in proper cases, may refuse to issue an order or may impose conditions it deems desirable. In exercising its discretionary power, the court may take into account the nature and attitudes of the government of the country from which the request emanates and the character of the proceedings in that country, or in the case of proceedings before an international tribunal, the nature of the tribunal and the character of the proceedings before it.

Senate Report at 3788. The Chairman of the Advisory Committee to the United States Commission on International Rules of Judicial Procedure expressed a similar viewpoint: "'[Section 1782] is a one-way street. It grants wide assistance to others, but *demands* nothing in return. It was deliberately drawn this way.'" *Malev*, 964 F.2d at 101 (quoting Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A.B.A.J. 650, 651 (1965)). Given that the statutory language is silent and the legislative history indicates that "[i]n exercising its discretionary power, the court *may* take into account the nature and attitudes of the government of the country from which the request emanates and the character of the proceedings in that country," Senate Report at 3788 (emphasis added), we find it difficult to believe that Congress actually intended section 1782 to have an implicit requirement that any evidence sought in the United States be discoverable under the laws of the foreign country. If Congress had intended to impose such a sweeping restriction on the district court's discretion, at a time when it was enacting liberalizing amendments to the statute, it would have included statutory language to that effect. As we discuss in Part III below, district judges may well find that in

appropriate cases a determination of discoverability under the laws of the foreign jurisdiction is a useful tool in their exercise of discretion under section 1782. We hold, however, that no such threshold requirement exists in the statute.

The Fodens cite First and Eleventh Circuit decisions that explicitly read a discoverability requirement into section 1782 and argue that the reasoning in those decisions is persuasive.[1] *See Asta Medica*, 981 F.2d at 7; *Lo Ka Chun*, 858 F.2d at 1566; *Trinidad and Tobago*, 848 F.2d at 1156. We disagree. In *Asta Medica*, the First Circuit held that the district court's discretion under section 1782 was "limited by the restriction [of discoverability] that we find . . . to be implicitly required by section 1782, based upon its history, rationale, and the policy considerations we have discussed." 981 F.2d at 7. The policy considerations cited are: maintaining the balance between litigants that each nation creates within its own judicial system, preventing circumvention of foreign restrictions on discovery and avoiding offense to foreign tribunals. We agree that each of these is a legitimate policy consideration and that the legislative history indicates that these concerns were part of

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[1] The Fodens claim that decisions of the District of Columbia and Third Circuits also "recognize[] the discoverability requirement." *See Crown Prosecution Service*, 870 F.2d at 687, 692-93 & n.7; *John Deere*, 754 F.2d at 135-36. Neither case concerns whether section 1782 requires a showing of discoverability under the laws of the foreign jurisdiction. At issue in *Crown Prosecution Service* are proper evidence-taking procedures pursuant to section 1782. The case merely cites *Trinidad and Tobago* and *John Deere* in support of the proposition that "[t]he district court should have inquired more closely whether the projected evidence-taking procedure 'represents the British practice,' when use of the evidence in court is anticipated." *Crown Prosecution Service*, 870 F.2d at 692 (citations and footnote omitted). *John Deere*, as discussed in Part II, is a case about reciprocity and admissibility.

the motivation for the legislation. However, we disagree with the First Circuit's holding that, as a result of these concerns, Congress intended section 1782 to have an implied discoverability requirement. Instead, we believe Congress intended that these concerns be addressed by a district judge's exercise of discretion. *See* Senate Report at 3788 ("[section 1782] leaves the issuance of an appropriate order to the discretion of the court"); *see also* Amram, *Public Law No. 88-619 of October 3, 1964 — New Developments in International Judicial Assistance in the United States of America*, 32 D.C.B.J. 24, 31 (1965) (under section 1782, "[t]he grant of power is unrestricted, but entirely within the discretion of the Court").

The Eleventh Circuit also explicitly has held that section 1782 requires a finding of discoverability under the laws of the foreign jurisdiction. *Lo Ka Chun*, 858 F.2d at 1566; *Trinidad and Tobago*, 848 F.2d at 1156. In *Trinidad and Tobago*,[2] the court states that the discoverability requirement exists and in support cites *John Deere*, 754 F.2d at 136, and a district court case, *In re Court of the Comm'r of Patents for South Africa*, 88 F.R.D. 75, 77 (E.D. Pa. 1980). *Trinidad and Tobago*, 848 F.2d at 1156. In *John Deere*, however, the Third Circuit merely decided that section 1782 does not require (1) that the foreign courts have similar judicial assistance procedures, or (2) that the evidence sought be admissible under the rules of evidence of the foreign jurisdiction. 754 F.2d at 135-36. *John Deere* is not a case about whether section 1782 requires discoverability, and the court never explicitly states that such a requirement exists. The Fodens, however, point to the court's language in *John Deere* that on the facts before it the discoverability requirement has been met, and that "[a] grant of discovery

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[2] *Lo Ka Chun* cites *Trinidad and Tobago* as support for the discoverability requirement.

that trenched upon the clearly established procedures of a foreign tribunal would not be within section 1782." *Id.* at 135. The Fodens also note the court's "[c]oncern that foreign discovery provisions not be circumvented by procedures authorized in American courts." *Id.* at 136. Nonetheless, we are unconvinced that these general concerns of the *John Deere* Court require the reading of an absolute discoverability requirement into section 1782. *See id.* at 136 n.3 (quoting the language of the Senate Report concerning section 1782's grant of discretionary power to the district courts and stating that "[i]t is doubtful whether such language can be expanded to impose a requirement that district courts predict or construe the procedural or substantive law of the foreign jurisdiction").[3]

III. Abuse of Discretion

The Fodens argue that even if section 1782 does not contain a discoverability requirement and consequently the district court did not err as a matter of law, the court nonetheless "abused its discretion in this case by issuing an order that will defeat important purposes of the statute." The Fodens assert that, according to their expert on Chilean law, in Chile

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[3] In the district court case cited by the Third Circuit, *Court of the Comm'r of Patents for South Africa*, the district court did not hold that section 1782 requires that a finding of discoverability be made prior to granting discovery under the statute. Instead, the court properly considered that "Congress expects the district courts to grant requests that will spur a reciprocity of cooperation," and held that under the facts before it, this purpose of the statute would be defeated by a grant of discovery. 88 F.R.D. at 77; *see also* Part III. The court found discoverability to be a useful guide to its exercise of discretion in the case before it because the Commissioner of Patents was not represented in the action and the court had grounds to believe that the applicant was attempting to circumvent South African discovery restrictions. 88 F.R.D. at 77.

"there is no pretrial discovery as we know it in the United States" and no compulsory process would be available in Chile to aid in the inventory of Ciro's assets. The Fodens then set out a parade of horribles that would result if we were to uphold the district court's grant of discovery, such as (1) granting to foreign litigants power to obtain information that they would not have in their home jurisdiction, thereby "ignoring principles of comity and risking offense to a friendly foreign sovereign," and (2) "opening the federal courts to a deluge of foreign litigants seeking to avoid the restrictions on pretrial discovery procedures in their own jurisdictions."

In his oral opinion, Chief Judge Cabranes first held that all of the requirements of section 1782 had been met and that discoverability was not a requirement of the statute. He then continued, in pertinent part:

> In any event, the court finds that the law of Chile empowers the provisional guardians to obtain the information about Ciro Gianoli's assets. The provisional guardians have a duty to compile an inventory of Ciro Gianoli's assets by order of the Chilean court . . . [and] under Article 378 of the Civil Code of Chile . . . . It is difficult, if not impossible, to conclude that a court that orders an inventory of this sort does not have the power to inquire into assets abroad so that the required inventory can be complete.
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> In fact, both parties agree that the Chilean court could issue a letter rogatory to inquire about assets that should be included in the required inventory . . . and that the enforcement of a letter rogatory would be governed by the law of the receiving nation, here the United States. . . .
>
> Finally, it is clear from the record that obtaining the information from the Fodens would not be an affront to the Chilean court or the Chilean sovereignty. It is clear

> that allowing the depositions to proceed would actually assist the Chilean court in its ongoing proceedings. In fact, the law of Chile does not prohibit a litigant from gathering evidence through methods that are lawful in the place where those methods are undertaken.

(citations omitted).

In *Malev*, we held that the "twin aims of providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts must inform our analysis of whether the district court abused its discretion." 964 F.2d at 100. Because the district court's exercise of discretion properly was guided by the purposes of section 1782, we hold that the court did not abuse its discretion. Although the district court did not make a finding as to the parties' ability to obtain pretrial discovery under Chilean law, it clearly made an *inquiry* into whether its grant of discovery under section 1782 would circumvent Chilean restrictions on discovery and whether its grant of discovery would be an affront to the Chilean court or Chilean sovereignty. In this way the district court assured that section 1782's purposes, especially that of encouraging international cooperation, were being furthered by the court's actions and not hindered.

Given that the guardians had been ordered by the Chilean court to compile an inventory of Ciro's assets, Chief Judge Cabranes reasonably found that it was highly unlikely that the Chilean court would not have the power to "inquire into assets abroad so that the required inventory can be complete." Because, as Chief Judge Cabranes also found, litigants in Chile are not prohibited from, "gathering evidence through methods that are lawful in the place where those methods are undertaken," a grant of discovery under section 1782 would be unlikely to circumvent Chilean discovery restrictions. Finally, Chief Judge Cabranes

reasonably found that because the district court's grant of discovery clearly would aid the Chilean court in obtaining a complete inventory, discovery under section 1782 would "not be an affront to the Chilean court or the Chilean sovereignty." Thus, despite no specific finding as to the availability under Chilean law of pre-trial discovery of the information sought, Chief Judge Cabranes satisfied himself that granting the section 1782 application on the facts before him would not be counter to the statute's "twin purposes." Because the district court's exercise of discretion was thus properly guided, we find no abuse of discretion. The parade of horribles predicted by the Fodens in the absence of extra-statutory restrictions on section 1782 is unlikely to occur given that district courts, in exercising their discretion, are not free to ignore the purposes underlying the statute.

IV. "Adjudicative Proceeding" Requirement

Finally, the Fodens argue that section 1782's requirement that discovery be granted only "for use in a proceeding in a foreign or international tribunal" has not been met in this case. The Fodens contend that "[t]he compiling of the inventory is not an adjudicative proceeding, but rather a non-contentious, unilateral task that the provisional guardians must complete before assuming guardianship." This argument is without merit. Ciro's incompetency proceeding before the Third Civil Court in Santiago, Chile is a "proceeding in a foreign . . . tribunal." The evidence sought in the district court pursuant to the order of the Chilean court is clearly "for use in" the proceeding. Whether or not the compilation of the inventory is contentious or adjudicative is irrelevant, because it is part of the incompetency proceeding.

CONCLUSION

We affirm the district court's grant of discovery against the Fodens pursuant to 28 U.S.C. § 1782. We hold that section

1782 does not contain a requirement that the material requested in the district court be discoverable under the laws of the foreign jurisdiction. Finally, we hold that the district court, by looking to the congressional purposes behind section 1782, properly informed its exercise of discretion.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

IN RE:

THE APPLICATION OF SILVIA GIANILI ALDUNATE and JOSE MIGUEL BARRIGA GIANOLI — 3:92-MC-186(JAC)

MARCH 8, 1993
NEW HAVEN, CONNECTICUT

B E F O R E:
HON. JOSE A. CABRANES, CHIEF U.S.D.J.

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Paul Collard
Official Court Reporter

THE COURT: I am now prepared to rule on the pending motion of January 8, 1993 to vacate the Court's order of November 16, 1992 and to quash the subpoenas issued pursuant thereto, based on a review of the record before me, including the arguments of counsel today.

Section 1782(a) of Title 28 of the United States Code provides, in relevant part, that the district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to the letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person. . . . (emphasis supplied).

It is clear to this court that all the requirements of section 1782 are met in this case. There is no dispute that the Fodens reside in the District of Connecticut; that Silvia Gianoli Aldunate and Jose Miguel Barriga Gianoli, the provisional guardians of Ciro Gianoli's property, are "interested persons" within the meaning of the statute; and that the provisional guardians have been ordered by a Chilean court to conduct an inventory of Mr. Gianoli's assets.

There is abundant evidence in the record that the Fodens are or may be in possession of relevant information on the assets of Ciro Gianoli and should be subject to discovery. In fact, counsel to the Fodens conceded on the record at this morning's oral argument that Ciro Gianoli had involved Maria Luisa Foden in his financial affairs. This admission, coupled with the allegations of fact of the provisional guardians, support the contention that the Fodens may have information on the whereabouts of Ciro Gianoli's assets.

Although the Fodens contend that the subpoenas should be quashed because "the information sought would not be available in Chile," see Foden Memorandum, filed January 8, 1993 at 10, there is no foundation for this

contention in section 1782. There is nothing in the text of Section 1782 that requires that the law of the foreign tribunal provide for discovery of the information sought in the United States. Although the Courts of Appeals of the First and Eleventh Circuits have held that a district court, before issuing an order of assistance, must determine whether the evidence sought in the United States would be discoverable in the foreign tribunal, our Court of Appeals has not adopted such a standard.

Our Court of Appeals recently dealt with related questions in Application of Malev Hungarian Airlines, 964 F.2d 97, 100 (Second Circuit), cert. denied, 113 S. Ct. 179 (1992). In Malev, the district court denied Malev's application under section 1782 on the grounds that Malev should have first requested discovery from a Hungarian court. Our Court of Appeals reversed the district court stating that "we find nothing in the text of 28 U.S.C. section 1782 which would support a quasi-exhaustion requirement of the sort imposed by the district court." Id. Malev requires a plain reading of the statute. The Fodens in the instant case are asking this court to impose a requirement that is not set forth in the text of section 1782. This court is mindful of the teaching of our Court of Appeals that a district court may not "impose extra-statutory barriers to obtaining discovery" under section 1782. Malev, 964 F.2d at 100.

In any event, the court finds that the law of Chile empowers the provisional guardians to obtain the information about Ciro Gianoli's assets. The provisional guardians have a duty to compile an inventory of Ciro Gianoli's assets by order of the Chilean court. See Affidavit of Jose Maria Eyzaguirre Garcia de la Huerta, filed February 5, 1993, at Paragraph 4. The guardians have the duty to compile the inventory of Ciro Gianoli's assets under Article 378 of the Civil Code of Chile. Id. It is difficult, if not impossible, to conclude that a court that orders an inventory of this sort

does not have the power to inquire into assets abroad so that the required inventory can be complete.

In fact, both parties agree that the Chilean court could issue a letter rogatory to inquire about assets that should be included in the required inventory. See Article 862, Civil Procedure Code of Chile in Eyzaguirre Affidavit at Paragraph 7, and that the enforcement of a letter rogatory would be governed by the law of the receiving nation, here the United States, not the sending nation. See 22 C.F.R. section 92.67(a).

Finally, it is clear from the record that obtaining the information from the Fodens would not be an affront to the Chilean court or the Chilean sovereignty. It is clear that allowing the depositions to proceed would actually assist the Chilean court in its ongoing proceedings. In fact, the law of Chile does not prohibit a litigant from gathering evidence through methods that are lawful in the place where those methods are undertaken. See Eyzaguirre Affidavit at Paragraph 17. Since any discovery in the instant action would proceed pursuant to the Federal Rules of Civil Procedure, there is no suggestion that the methods used in the instant case would be unlawful or would otherwise offend the sense of justice of Chile's courts or our own courts.

Based on the full record before me, including this morning's oral argument, the Motion to Vacate Order and Quash Subpoenas, filed January 8, 1993 of Maria Luisa Foden and Edward Foden is hereby Denied. It is so ordered.